

LEGAL AND FINANCIAL MECHANISMS

The state legislature has recognized the ecological, economic and social benefits of creating a state water right acquisition program. Lawmakers enacted several statutory provisions that address the legal constraints found in the state surface and groundwater codes by establishing a “trust” water right program. Under the program, the Department of Ecology is authorized to acquire water rights from willing water-right holders, and hold the water in trust in order to increase stream flows or provide water for irrigation, municipal and other beneficial uses. Later provisions were added to encourage water donations to the trust water program and fast-track application processing, including transfers of acquired water rights to the trust water right program.

I. Statutory foundation for acquiring ‘trust’ water rights

Two pieces of legislation – the 1989 Yakima Basin Trust Water Rights Act and the 1991 Water Resources Management Act – created a trust mechanism to acquire water rights on a voluntary basis. Under the measures, water rights can be transferred to meet presently unmet needs, including instream flows for fish.

Under the trust water law, Ecology can acquire water rights through purchases, leases, donations and other appropriate means, including water conservation projects, from any person or entity or combination of persons or entities. Once acquired, these rights become trust water rights. The following outlines some general legislative provisions:

- **A “trust water right” means any water right acquired by the state** for management in the state’s trust water rights program.
- **A water right acquired by the state expressly conditioned to limit its use to instream purposes** must be used as a trust water right in compliance with that condition.
- **Trust water rights retain their priority date** during time they are held in trust and are not subject to relinquishment due to lack of use.
- **Trust water rights can redirect the use of conserved water saved through state- or federally-funded conservation.** The conserved water or “net water savings” means the amount of water determined to be conserved and usable within a specified stream reach for other purposes without impairment or detriment to water rights existing at the time that a water conservation project is undertaken.
- **Trust water rights must not reduce the ability to deliver, or supply water** that otherwise would have been available to other existing water uses.

In 2001 and 2002, the legislature expanded the trust water rights program by encouraging water donations to help provide stream flows for fish. The law also requires Ecology to manage donated rights so they qualify as a charitable deduction for tax purposes, although the agency cannot guarantee every donation will qualify.

In 2001, lawmakers created two lines for water-right applications – one for new rights and one for changes and transfers. This enables Ecology to pull changes and transfers that had been stuck behind requests for new water rights, significantly simplifying the task of processing these

applications. In 2002, the legislature also created an expedited process to establish a donation, waiving the advanced, detailed public review for water rights donated in the short-term designed to help achieve an established instream flow.

II. Other legal and institutional mechanisms

1. Salmon Recovery Funding Board

Created in 1999, the Salmon Recovery Funding Board is responsible for funding the most important salmon habitat projects and activities. Using the best available science, the board funds habitat projects that protect, restore and enhance salmon habitat and watershed functions, including land and water acquisitions. The board has also approved funding for setting, achieving and monitoring instream flows – \$6.9 million in federal money earmarked by Congress for salmon recovery and with another \$2 million in state funds to augment existing resources to acquire water through purchases, leases and other means to meet instream flows in the 16 critical basins.

2. Local Conservation Districts: Water Irrigation Efficiencies Grant Program

In 2001, lawmakers set aside \$7.8 million to provide grants to farmers to improve the efficiency of their existing irrigation systems. The Washington Conservation Commission is making the funds available to local conservation districts with the following conditions and limitations:

- **Grants are made to local conservation districts to assist the agricultural community** in implementing water conservation measures and irrigation efficiencies in the state's 16 critical basins. Only 19 local conservation districts are eligible to apply for grants.
- **Grants are awarded based on demonstrated need and environmental benefit.** A conservation district receiving funds will manage each grant to ensure a portion of the water saved by the water conservation measure or irrigation efficiency will be placed in the Trust Water Rights Program to enhance instream flows.
- **The proportion of saved water placed in the trust water rights program must be at least equal** to the percentage of the public investment in the conservation measure or irrigation efficiency.
- **The percentage of the public investment may not exceed 85 percent of the total cost** of the conservation measure or irrigation efficiency. When awarding grants, priority will be given to family farms.
- **No single project can receive more than 6.25 percent** of the total financial assistance funds available for allocation.
- **The amount of saved water will be determined** by the U.S. Department of Agriculture's Natural Resource Conservation Service, in consultation with Ecology and Center for Environmental Law and Policy (CELP).
- **Contracts must be approved by Ecology and the Conservation Commission.**
- **The lease of saved water is for a minimum of 10 years.**
- **The Washington Conservation Commission will submit a progress report** to the Legislature by Feb. 1, 2003.

3. Bonneville Power Administration

The Northwest Power Planning Council, National Marine Fisheries Service (NMFS) and Bonneville Power Administration (BPA) have recognized the need for water rights acquisition to restore water in many streams within the Columbia Basin.

The Northwest Power Planning Council, in its 2000 Columbia River Basin Fish and Wildlife Program, noted that “experience implementing this program has shown great advantages in being able to move quickly and flexibly to acquire interests in land and water rights for the purpose of protecting or enhancing fish and wildlife habitat.” Water right acquisition has also been recognized by NMFS in the Federal Columbia River Power System Biological Opinion.

Additionally, BPA is required to implement innovative ways to increase tributary flows within the Columbia River Basin, including establishing a “water brokerage.” The Washington Water Trust, Walla Walla Watershed Alliance and state Department of Ecology have all been approved as local brokerage entities in Washington. Therefore, Ecology is eligible to submit proposals to BPA’s regional entity, the Northwest Fish and Wildlife Foundation, for funding consideration and implement proposals that meet BPA’s Water Transaction Program goals.

4. Washington Water Trust

Washington Water Trust, a private, nonprofit organization founded in 1998, works to restore instream flows in Washington’s rivers and streams. It is the only non-governmental organization working statewide to restore flows to streams and rivers by acquiring water rights. The entity works cooperatively with farmers, ranchers, irrigation districts, tribes, public agencies, land trusts and other non-governmental organizations to acquire water rights from willing sellers through purchases, leases or gifts to improve water quality, fisheries and recreation. The Trust works on small streams and tributaries to identify streams and rivers that have a combination of low flows, endangered or threatened fish species and water-right holders willing to sell, lease or donate their water rights. The organization acquires water rights from voluntary leasers or sellers, leaving acquired water in rivers and streams.

5. Nature Conservancy

The Nature Conservancy’s mission is to “protect the plants, animals and natural communities that represent the diversity of life on Earth.” The organization has an extensive land acquisition program to protect and conserve fragile habitats while promoting economic development. Some land acquisition projects have valid water rights that can be transferred to the trust water right program. Ecology will work with local Nature Conservancy chapters to acquire water rights and help transfer them to the state trust water right program.

6. 2002 Federal Farm Bill

The 2002 federal farm bill contains special provisions for surface and ground water conservation. Additional funding has been appropriated for increasing the use of efficient irrigation systems.

III. Funding sources: State, federal and private

Funding sources for water rights acquisitions include:

- **\$3.5 million appropriated by the Legislature** during the 2001-03 budget biennium to be used for water rights acquisition in the 16 critical basins.
- **\$2 million approved by the state Salmon Recovery Funding Board** to augment existing resources to acquire water to meet instream flows in the 16 critical basins.
- **\$7.8 million in grant money available to farmers** operating in the 16 critical basins through the Water Irrigation Efficiencies Grant program.
- **Federal agencies** such as the U.S. Bureau of Reclamation and Bonneville Power Administration are funding water-rights acquisitions to mitigate the effects of past and current water and land developments.
- **Finally, various private entities** such as the Washington Water Trust are spending money to acquire water rights to help achieve instream flow requirements.